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Supreme Court, U.S.
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No. 99-782

In the Supreme Court of the United States

PUBLIC CITIZEN, ET AL., PETITIONERS

v.

JOHN CARLIN, ARCHIVIST OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Records Disposal Act, 44 U.S.C. 3301-3324 (1994 & Supp. III 1997), authorized the Archivist of the United States to issue General Records Schedule 20, which allows agencies to delete unneeded electronic records stored on "live" (*i.e.*, actively used) electronic mail or word processing systems after those records have been copied and preserved in an electronic, paper, or microform recordkeeping system.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 184 F.3d 900. The opinion of the district court (Pet. App. 21a-53a) is reported at 2 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1999. The petition for a writ of certiorari was filed on November 4, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a "general records schedule," GRS 20, issued by the Archivist of the United States. GRS 20 permits federal agencies,

among other things, to delete unneeded electronic versions of records from "live" word-processing and other actively used electronic systems once the records have been preserved—on paper, in electronic format, or on microform—in the agency's recordkeeping system.

1. A series of statutes, cumulatively known as the Federal Records Act (FRA), governs the creation, preservation, and disposition of federal records by federal agencies. 44 U.S.C. 2101-2118, 2901-2909, 3101-3107, 3301-3324 (1994 & Supp. III 1997).[1] The FRA's general purpose is "to require the establishment of standards and procedures to assure efficient and effective records management." 44 U.S.C. 2902.[2] To that end, the FRA requires that agencies "make and preserve records containing adequate and proper documentation of the organization, functions, policies, deci-

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[1] The term "records" as used in the FRA includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 U.S.C. 3301.

[2] That general goal of effective records management includes, but is not limited to, the promotion of "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"; "[c]ontrol of the quantity and quality of records"; "[e]stablishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records"; "[s]implification of the activities, systems, and processes of records creation and of records maintenance and use"; and "[j]udicious preservation and disposal of records." 44 U.S.C. 2902.

sions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. 3101. In addition, each agency must "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. 3102.

The FRA charges the Archivist with establishing "standards for the selective retention of records of continuing value," and with "assist[ing] Federal agencies in applying the standards to records in their custody." 44 U.S.C. 2905(a).[3] The Records Disposal Act, in turn, prohibits agencies from disposing of records without the Archivist's approval. 44 U.S.C. 3303a(a) (1994 & Supp. III 1997). Agency heads must submit to the Archivist: (1) lists of any agency records "that have been photographed or microphotographed" and that, as a consequence, "do not appear to have sufficient value to warrant their further preservation"; and (2) lists of other records that are not needed in the transaction of current business "and that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U.S.C. 3303(1) and (2). See also 44 U.S.C. 3303a (1994 & Supp. III 1997). The statute also permits agency heads to submit to the Archivist,

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[3] The Archivist also must "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition." 44 U.S.C. 2904(a). The Administrator of the General Services Administration (GSA) has a similar responsibility to "provide guidance and assistance to Federal agencies to ensure economical and effective records management." 44 U.S.C. 2904(b).

for approval, "schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules," where those records "apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U.S.C. 3303(3).

Section 3303a(d) of Title 44 also authorizes the Archivist to issue "general records schedules" to govern the disposition of "records of a specified form or character common to several or all agencies." The Archivist may issue general records schedules "authorizing the disposal" of such records "after the lapse of specified periods of time," where the records "will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government." 44 U.S.C. 3303a(d). Pursuant to that authority, the Archivist has promulgated 23 general records schedules covering a wide array of records common to all or most agencies. See generally 36 C.F.R. 1228.44.

2. The Archivist first issued a general records schedule covering electronic records created by mainframe computers in 1972. See 60 Fed. Reg. 44,643, 44,644 (1995). In 1994, the Archivist issued a request for public comment on proposed revisions to GRS 20, which governs the disposition of a wide variety of electronic records on stand-alone and networked computers, 59 Fed. Reg. 13,906 (1994), and on proposed revisions to recordkeeping requirements for electronic mail, 59 Fed. Reg. 52,313 (1994). Following review of the comments, the Archivist determined that federal agencies do not have the capacity to preserve electronic

information indefinitely on the "live" office computer systems and applications used on a day-to-day basis by agency personnel. Instead, agencies must delete records "to avoid system overload and to ensure effective records management." 60 Fed. Reg. at 44,644. The Archivist also found that requiring agencies to continue preserving information on "live" word processing systems would be of little benefit to agency personnel or researchers, because those systems consist of disparate electronic files maintained by individuals, rather than centrally controlled and organized recordkeeping systems. *Id.* at 44,646.

Consistent with those conclusions, the Archivist amended GRS 20 to permit the disposal of certain electronic records in 15 enumerated categories—including electronic records created by computer operators, programmers, analysts, and systems administrators, as well as government staff using office automation applications—from "live" desktop computer applications, but only after *two* conditions are met. First, the electronic records to be deleted may not be disposed of until after they have ceased to be useful to the agency. Second, they may not be disposed of until after they have been copied (in an electronic format or on paper or microform) to the agency's official recordkeeping system. Pet. App. 69a-71a.

For example, Item 13 of GRS 20 governs electronic copies of word processing records on "live" word processing applications. Item 13 permits electronic copies of word processing files to be deleted from the word processing system "after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes," if they are "no longer needed for updating or revision." 60 Fed. Reg. at 44,649. Item 14 of GRS 20 covers copies of electronic

mail messages that qualify as records. It permits deletion of "[s]enders' and recipients' versions of" such electronic mail messages from a live e-mail system only "after they have been copied to an electronic recordkeeping system, paper or microform for recordkeeping purposes." *Ibid.* Item 14 goes on to state that "[a]long with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required." *Ibid.*

3. Petitioners are several not-for-profit library and historical associations as well as two private individuals. They brought this action against the Archivist and three other Executive Branch entities, alleging that GRS 20 exceeds the scope of the Archivist's statutory authority and is arbitrary and capricious.[4]

The district court granted summary judgment for petitioners, holding that the Archivist exceeded the scope of his statutory authority in promulgating GRS 20. Pet. App. 36a.[5] First, the district court held that GRS 20 exceeds the Archivist's authority under 44

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[4] Count two of the complaint challenged the disposition, under GRS 20, of word processing documents created by the Office of the United States Trade Representative (USTR) from 1986 through 1992, and preserved on "backup tapes" pursuant to an injunction in earlier litigation. After petitioners brought this action, USTR notified the Archivist that it wished to withdraw its disposition schedule for those records and to submit a separate disposition schedule without relying on GRS 20. The district court denied the government's motion to dismiss count two as moot. Pet. App. 32a-33a. The government did not appeal with respect to that issue.

[5] The district court also denied the government's motion for summary judgment, holding that petitioners have standing (Pet. App. 27a-32a), and that the Executive Office of the President is a proper party to this action (*id.* at 33a-35a).

U.S.C. 3303a(d) because it authorizes the disposition of so-called "program" records reflecting substantive agency decisions and activities. According to the district court, Section 3303a(d) empowers the Archivist to issue general records schedules only for "routine housekeeping records." Pet. App. 38a-40a.

Second, the district court held that the Archivist failed to determine whether the records that GRS 20 schedules for disposal will have "sufficient administrative, legal, research or other value to warrant continued preservation" at the time disposal is authorized. Pet. App. 47a. The court reasoned that, although paper copies may adequately preserve the value of an electronic record in some instances, the Archivist could not determine that paper copies would preserve the value of electronic records in all cases. *Id.* at 48a. Third, the district court held that, by allowing disposal of records "when no longer needed" (after copies are placed in the recordkeeping system), GRS 20 fails to provide for disposal of records after "specified periods of time" within the meaning of 44 U.S.C. 3303a(d). Pet. App. 49a-51a.

4. The court of appeals reversed. Pet. App. 1a-20a. Applying the two-step analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court first rejected petitioners' contention that 44 U.S.C. 3303a(d) limits the Archivist to issuing general records schedules for so-called "housekeeping" records. Pet. App. 5a-11a. The court of appeals observed that the statutory language does not distinguish between "housekeeping" and "program" records; instead, it gives the Archivist authority to schedule for disposal *all* "records of a specified form or character." *Id.* at 5a. The statute's plain text, the court concluded, thus "seems to reject rather than to compel

the proffered distinction between program and housekeeping records." *Id.* at 6a. The court also rejected petitioners' contention that the legislative history of the statute requires a different result, declining to accept the "invitation to use legislative history to supplant rather than to interpret the statute." *Id.* at 8a.

Proceeding to *Chevron* step two, the court of appeals rejected petitioners' contention that GRS 20 is irrational because it authorizes the destruction of all records on a given medium, without regard to each record's value or content. That argument, the court of appeals explained, "is based upon a misunderstanding of GRS 20 and the Archivist's rationale for adopting it." Pet. App. 9a. The court observed:

> GRS 20 does not authorize disposal of electronic records *per se*; rather, such records may be discarded only after they have been copied into an agency recordkeeping system. Therefore, GRS 20 seems to us to embody a reasoned approach to accomplishing the potentially conflicting goals of the Congress: "[j]udicious preservation and disposal of records." [44 U.S.C.] § 2902(5).

Pet. App. 9a (footnote omitted).

The court of appeals also rejected petitioners' contention that GRS 20 fails to specify properly the "periods of time" after which records may be disposed of. "[W]e do not see," the court said, "how the phrase 'specified periods of time'" in Section 3303a(d) "can be said unambiguously to require the Archivist to select a period in terms of months or years." Pet. App. 11a. Instead, the court of appeals explained, it was permissible to read the phrase as permitting the Archivist to specify time periods based on triggering events. Here, the Archivist's reliance on those triggering

events was entirely reasonable: "[I]f the Archivist is to make the best determination of when records of a certain type will cease to have sufficient value to warrant their retention, then it is eminently sensible that he be able to rest that determination upon a future condition the occurrence of which will diminish the value of the records, without requiring that he predict precisely when that will occur." *Id.* at 12a.

The court of appeals also rejected petitioners' contention that GRS 20 is arbitrary and capricious. It explained that the Archivist made an explicit finding that the records on "live" desktop computer applications lack sufficient value to warrant continued preservation once they have been transferred or preserved to a paper, electronic, or some other form of recordkeeping system. Pet. App. 13a. While petitioners contended that electronic records can be searched, manipulated and indexed in ways that paper records cannot, the court of appeals noted that such searching, indexing, and manipulation was not possible with respect to records on "live" office systems, such as individual personal computers. "Public Citizen's argument ignores [the] obviously material difference between the value of records that are part of an agency's centralized recordkeeping system and the value of those that are accessible only by searching a particular personal computer. We do not think the Archivist acted unreasonably in discounting the comparative value of 'disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems.'" *Id.* at 15a (quoting 60 Fed. Reg. at 44,646).

Finally, the court of appeals rejected petitioners' contention that GRS 20 is arbitrary and capricious because electronic records may contain information that is not contained in the printed version. Pet. App. 18a.

With respect to electronic mail, the court noted, GRS 20 expressly requires that the agency recordkeeping system capture all relevant transmission data. *Ibid.* With respect to word processing files, the court of appeals interpreted GRS 20—in light of the preamble's statement that recordkeeping systems must preserve the document's "content, structure, and context"—as likewise mandating the preservation of all records information associated with electronic files, including "hidden" information that might not ordinarily print out. *Id.* at 18a-19a.

ARGUMENT

The court of appeals held that GRS 20 reflects a reasonable interpretation of the Records Disposal Act. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, this Court's review is not warranted.

1. This case arises out of the proliferation of desktop computer applications used to create federal agency records. The Archivist found that records generated on "live" desktop computer programs used by individual agency employees—such as electronic mail or word processing systems—must be deleted from those systems to ensure proper records management and to avoid computer overloads that would lead to system failure. See 60 Fed. Reg. 44,643, 44,644 (1995). The Archivist also found that records left on "live" computer systems are of little value to agency personnel and outside researchers once they have fallen out of use, since they are often inaccessible or unknown to anyone but their creator, and cannot be indexed or searched efficiently. *Id.* at 44,645.

The Archivist adopted the present version of GRS 20 as a rational and pragmatic response to those findings.

GRS 20 requires agencies to preserve specified electronic records by transferring them to the agency's official recordkeeping system, whether that system is electronic, paper, or microform. That recordkeeping system must preserve the records' "content, structure, and context for their required retention period." 60 Fed. Reg. at 44,644. Only after the records are properly preserved in such a recordkeeping system may unused and unneeded copies be deleted from the agency's "live" computer applications.

Petitioners contend (Pet. 14-17) that the Archivist acted unreasonably by authorizing the deletion of electronic records regardless of their value. However, as the court of appeals recognized (Pet. App. 14a-15a), petitioners' argument reflects a persistent misunderstanding of what GRS 20 does. GRS 20 does not authorize the deletion of records from the agency's electronic or other *recordkeeping* systems. Nor does it address the separate question of what kind of recordkeeping system agencies should have. GRS 20 simply authorizes the deletion of material from "live" computer desktop systems *after* that material has been transferred to an agency recordkeeping system that preserves each record's content, structure, and context.

In that respect, the Archivist expressly considered the value of records maintained on "live" desktop computer applications and concluded that, once they have been "copied" to a recordkeeping system, their value is insufficient to warrant continued preservation. As the Archivist explained:

> For records to be useful they must be accessible to all authorized staff, and must be maintained in recordkeeping systems that have the capability to group similar records and provide the necessary

> context to connect the record with the relevant agency function or transaction. Storage of electronic mail or word processing records on [live] electronic information systems that do not have these attributes will not satisfy the needs of the agency or the needs of future researchers.

60 Fed. Reg. at 44,644. Accordingly, the Archivist determined that maintaining electronic records on "live" word processing and electronic mail systems "that do not provide the necessary records management functions, just for the sake of maintaining [those records] in electronic format as many respondents advocate * * * would be of limited use to both the originating agency and to future researchers." *Id.* at 44,645. "Such a practice would not support agency operations, and researchers would have to search disassociated, unindexed collections of materials for potentially valuable records, which would result in finding a large proportion of irrelevant documents, and inefficient use of research time." *Ibid.* See also *id.* at 44,644 ("Search capability and context would be severely limited if records are stored in disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems.").

Petitioners' lengthy discussion of the importance of electronic records (Pet. 14-15) thus amounts to nothing more than a disagreement with the Archivist's reasoned conclusions. Moreover, petitioners' analysis is based on the incorrect assumption that the electronic records subject to GRS 20 are stored on publicly-accessible, centralized computer systems. For instance, petitioners contend (Pet. 14) that electronic records can be "distributed more easily and more widely" and "searched and indexed more easily." But petitioners

overlook the fact that GRS 20 governs the disposition of records contained on "live" desktop computer applications residing, for example, on separate personal computers in individual offices. There is no reason to believe that functions like indexing, searching and distribution currently would prove any easier from those myriad individual computers than they would from the centralized, indexed, and organized paper copies kept in an agency's centralized recordkeeping system.

Petitioners also take issue with the Archivist's finding that electronic records are of limited use unless they are maintained in a centralized recordkeeping system. Pet. 17. In particular, they argue that the finding "is not the same as finding that the electronic records lack *any* 'administrative, legal, research or other value' that would warrant further preservation, as 44 U.S.C. § 3303a(d) requires." Pet. 17. Petitioners misread the statute. Section 3303a(d) does not require a finding that the records lack *any* administrative, legal, research, or other value. It requires only that, in the Archivist's judgment, the records lack "*sufficient* administrative, legal, research, or other value to warrant their further preservation by the United States Government." 44 U.S.C. 3303a(d) (emphasis added). The Archivist reasonably determined that records maintained on "live" computer applications are of little (*i.e.*, not "sufficient") value once they are no longer in use and have been duplicated—in a printed, microform, or electronic form that preserves all relevant information—in the agency's centralized recordkeeping system.

Petitioners also suggest (Pet. 17-18) that GRS 20 is flawed because it does not address whether an agency's recordkeeping system should be electronic, paper or

microform. Petitioners apparently believe that it is unreasonable for the Archivist to authorize deletion of electronic material from "live" computer applications—even if system overload is threatened—unless the agency's official recordkeeping system will store copies *electronically*. Petitioners, however, point to nothing in the statute requiring agencies to use an electronic rather than paper recordkeeping system. Pet. App. 17a. In any event, the development of appropriate recordkeeping systems is a separate matter beyond GRS 20's scope. 60 Fed. Reg. at 44,644 ("Separate * * * guidance and regulations instruct agencies to appropriately preserve records that are produced through office automation in the form that they determine is best to accomplish their mission within their administrative and fiscal capabilities."). See also *id.* at 44,634, 44,635, 44,639. Indeed, we are informed that for that very reason the Archivist has been working with individual agencies—outside of GRS 20 proceedings—to encourage and aid the move to electronic recordkeeping, which the Archivist considers worthwhile in the long-term. That process, however, has little to do with the validity of GRS 20, which does not address whether an agency's recordkeeping system should be paper, microform, or electronic. As the court of appeals noted: "[The Archivist's] decision to permit agencies to maintain their recordkeeping systems in the form most appropriate to the business of the agency is reasonable. Nor does [petitioner] claim that agencies have a legal duty to establish electronic recordkeeping systems." Pet. App. 17a.[6]

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[6] Petitioners suggest (Pet. 16) that the Archivist need not require all agencies to develop electronic recordkeeping systems, but instead can approve individual agency disposition schedules or

2. Petitioners also ask this Court to resolve an alleged conflict among the circuits regarding the degree to which courts should defer to agency interpretations first articulated during litigation. See Pet. 19-26. This Court has held that courts normally should not accord deference to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). However, this Court has recognized that deference to an agency's interpretation of its own regulations may be appropriate even if that interpretation "comes * * * in the form of a legal brief" where the interpretation is "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action from attack" and there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (quoting *Georgetown Univ. Hosp.*, 488 U.S. at 212). See also *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988). There is no conflict, however, on that issue in the courts of appeals. In any event, the agency's positions in this case were fully grounded in the administra-

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narrower general schedules that distinguish electronic records that must be preserved electronically. Again petitioners miss the point. Whether an agency maintains an electronic recordkeeping system or a paper recordkeeping system, material on "live" computer desktop applications must be deleted to ensure proper records management and avoid system overload. Thus, despite petitioners' protestations to the contrary, petitioners' approach would mandate that agencies either adopt electronic recordkeeping or maintain records on "live" systems indefinitely and risk potential system failure as a result. There is no statutory basis for such a requirement, and the Archivist did not act unreasonably in declining to adopt it.

tive record, the rationale set out in the notice adopting GRS 20, and prior agency practice.

a. According to petitioners, most courts of appeals will not defer to agency positions set forth in court except where the agency is not a party and submits its views in the form of an amicus brief. Pet. 21. The District of Columbia Circuit and the Third Circuit, petitioners seem to argue, are more amenable to deferring to agency litigating positions. See Pet. 22. Petitioners misread the cases.

For example, while petitioners characterize several cases as holding that agency positions articulated in litigation do not warrant deference *unless* the positions are asserted in an amicus brief, see Pet. 21-22, the cases on which petitioners rely do not so hold. Three of the decisions cited by petitioners merely hold that, consistent with this Court's decisions, deference *is* appropriate to an agency position articulated in an *amicus* brief so long as the position is not a post hoc rationalization to defend past agency action, and the interpretation appears to reflect the agency's fair and considered judgment. See *Jones* v. *American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999); *Hertzberg* v. *Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999); *Norwest Bank Minnesota Nat'l Ass'n* v. *Sween Corp.*, 118 F.3d 1255, 1259 n.5 (8th Cir. 1997). None of those decisions establishes a per se bar against deferring to the agency's considered view of a matter under appropriate circumstances simply because the agency expresses its view as a party or by means other than an amicus brief.

Nor do the two decisions of the Seventh Circuit cited by petitioners (see Pet. 21-22) adopt that rule. In *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557, 563 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000) (see

Pet. 21), the Seventh Circuit held only that deference was inappropriate when an agency filed an amicus brief taking a new and "radical stance" on an issue, when the agency had never addressed the issue before. 179 F.3d at 563. And in *Harco Holdings, Inc.* v. *United States*, 977 F.2d 1027, 1035 (7th Cir. 1992) (see Pet. 22), the court of appeals merely refused to accord deference to an agency interpretation that was "not only new and unsupported by agency practice or rulings," but also "internally inconsistent." See also *William Bros., Inc.* v. *Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (refusing to defer to a "novel position" raised in litigation where the agency has adopted a contradictory position on related issues). Thus, neither of those cases holds that courts may not defer to agency positions articulated in litigation unless they are expressed in amicus briefs. Instead, by relying on the inconsistent or radical nature of the agency's approach, those cases merely implement this Court's admonitions that deference is not appropriate for "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *Georgetown Univ. Hosp.*, 488 U.S. at 212, or where there are other reasons to doubt that the positions reflect "the agency's fair and considered judgment," *Auer*, 519 U.S. at 462.

Petitioners' effort to characterize District of Columbia Circuit and Third Circuit case law as inappropriately receptive to agency litigating positions (Pet. 22-23) likewise is not well supported. In *Tax Analysts* v. *IRS*, 117 F.3d 607 (D.C. Cir. 1997) (see Pet. 22-23), for example, the court of appeals stated that "[o]ne might consider" the agency's interpretation of its decisions to be "a litigation position," but noted that such a characterization "would not *necessarily* preclude * * * defer[ence] to the agency's interpretation." 117 F.3d at

613 (emphasis added). The court, however, did not find it necessary to resolve the deference question because it concluded that the IRS intepretation at issue was not permissible, and could not be upheld, even if deference was proper. *Id.* at 616. Likewise, in *United Seniors Ass'n* v. *Shalala*, 182 F.3d 965, 971 (1999) (see Pet. 23), the District of Columbia Circuit acknowledged (in *dictum*) that it may be appropriate to defer to agency views expressed in legal briefs "under the appropriate circumstances." There, however, the court concluded that deference was appropriate because the agency's position was firmly established prior to the litigation, having been repeatedly and consistently expressed—and adhered to—in the past. And in *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906 (1999) (see Pet. 23), the District of Columbia Circuit noted (again in *dictum*) that courts may, "under the appropriate circumstances," defer to agency views expressed in legal briefs. The court of appeals, however, *declined* to defer to the agency's construction there because the court could not understand what the agency's position was, 172 F.3d at 911, and because it found the regulations clearly arbitrary and capricious in any event, *id.* at 911-913.

Finally, petitioner is incorrect to claim (Pet. 22) that the Third Circuit's decision in *Connecticut General Life Insurance Co.* v. *Commissioner*, 177 F.3d 136, 144, cert. denied, 120 S. Ct. 496 (1999), establishes a circuit conflict. In that case, the court of appeals expressly recognized that it could not defer to an agency interpretation that is not supported by "regulations, rulings or administrative practice," and noted that it would not defer to "an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Id.* at 143-144 (quoting *Georgetown*

Univ. Hosp., 488 U.S. at 212). The court later discussed deference to an agency position articulated in litigation, but only in the context of determining whether the agency in fact had expressly reserved judgment on a particular issue, or had instead articulated a view on the matter. 177 F.3d at 144. The decision hardly establishes a conflict among the circuits over the degree of deference accorded to agency interpretations articulated in litigation.

b. Even if there were a square conflict on this issue —and we do not believe there is one—the court of appeals in this case did not defer to mere litigation positions. Instead it deferred to positions that were well supported in the Archivist's decision, in the administrative record, and in established practice. Thus, while petitioners claim (Pet. 23) that the court of appeals thrice deferred to "new interpretations" offered for the first time in litigation, that claim is not correct.

Petitioners first contend (Pet. 11, 23) that the court of appeals deferred to the Archivist's view that the general records schedule authority contained in 44 U.S.C. 3303a(d) extends to so-called "program" records (and is not limited to "administrative" or "housekeeping" records), even though that construction was first articulated in the course of this litigation. But the court of appeals nowhere suggested that the Archivist's construction of Section 3303a(d) was novel or newly-articulated in this litigation. Nor was it. The Archivist in fact concluded that Section 3303a(d) extended to so-called program records (before this litigation began) in the notice announcing GRS 20.[7] The scope of GRS 20

[7] The Archivist explicitly addressed the objections, made by various commenters, that GRS 20 improperly authorized dis-

itself evidences that construction as well, since it was promulgated under Section 3303a(d) and unambiguously applies to program and housekeeping records alike. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of" the agency's "decision."). Indeed, as the court of appeals noted (Pet. App. 10a), at least one *earlier* general records schedule expressly applied to program records. See 60 Fed. Reg. at 44,644. Thus, far from deferring to a novel litigating position on this issue, the court of appeals merely—and properly—deferred to the established and previously articulated interpretation of Section 3303a(d) adopted by the Archivist.[8]

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posal of "program" records. Program records, the Archivist noted, would be preserved in each agency's recordkeeping system:

> The critical point is that the revised GRS does not authorize the destruction of the recordkeeping copy of the electronic mail and word processing records. The unique program records that are produced with office automation will be maintained in organized, managed office recordkeeping systems. Federal agencies must have the authority to delete the original version from the "live" electronic information system to avoid system overload and to ensure effective records management. Program records that have been transferred to the recordkeeping system will not be affected by GRS 20. Their disposition is controlled by other general or specific records schedules.

60 Fed. Reg. at 44,644. The Archivist went on to explain that "[a]s indicated in the responses to comments above, the approval of GRS 20 will not affect unique program records that have been preserved in a recordkeeping system." *Id.* at 44,647.

[8] Contrary to petitioners' position, the Archivist's construction of Section 3303a(d) did not depart from prior practice. Pet. App. 10a-11a ("Public Citizen has identified no policy of the Archivist with which GRS 20 is inconsistent."). Although petitioner cites

Nor did the court of appeals defer to a mere litigating position when it upheld the Archivist's construction of the phrase "after the lapse of specified periods of time" in Section 3303a(d). See Pet. 12. The court of appeals concluded that, consistent with Section 3303a(d)'s language, the Archivist may specify time periods for record retention by using triggering events, such as the date on which the record is copied to a recordkeeping system; the court rejected petitioners' contrary position, under which the Archivist would be required to specify dates more "rigidly in terms of months or years." See Pet. App. 12a. In so doing, the court of appeals rejected petitioners' contention that the Archivist's flexible construction was first articulated in this litigation, finding that it was articulated "in GRS 20 itself." *Id.* at 12a n.* (quoting *National R.R. Passenger Corp.*, *supra*). The Archivist, in any event, has long construed Section 3303a(d) in the same manner, by issuing general records schedules for the disposition of records upon triggering events (*e.g.*, once the document is "superseded" or when the matter "is completed") since at least 1955. See Addendum to Defendants' Motion for Summary Judgment, Tab 27 (GRS 1, items 18a, c).[9]

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earlier statements indicating that general records schedules cover "administrative" records, those statements were made in a different context, *id.* at 10a, and do not assert that general records schedules cannot include program records as well.

[9] Indeed, until 1970, each of those general records schedules was expressly approved in congressional committee reports, C.A. App. 124, 126, which gave no indication of dissatisfaction with the Archivist's construction of the statute. Cf. *Haig* v. *Agee*, 453 U.S. 280, 291-300 (1981) (agency interpretation of statute may be ratified by Congress). In addition, Congress repeatedly amended the Records Disposal Act without taking issue with those

Nor did the court of appeals improperly defer to government counsel's interpretation of GRS 20 itself. See Pet. 12, 23. According to petitioner, the court of appeals placed inappropriate weight on counsel's clarification, at oral argument, that GRS 20 requires *all* information forming part of an electronic record—including "hidden comments or summaries that are not [ordinarily] printed out" and "the electronic equivalents of a Post-it note or an abstract"—to be printed out and preserved where a paper recordkeeping system is used. See Pet. App. 18a-19a. It is far from clear that the court of appeals in fact "deferred" to counsel's concession at argument. To the contrary, the court of appeals appears to have relied on that concession simply to clarify the argument made in the Archivist's brief, see *ibid.*—namely, that GRS 20 contains the very requirement that petitioners feared might be lacking, because GRS 20's preamble specifies that recordkeeping systems must preserve each record's "content, structure, and form."[10]

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schedules. See *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961) (congressional acquiescence in agency's construction, as communicated to a congressional committee, can support agency interpretation).

[10] Before referring to counsel's representation, the court of appeals recited the explanation in the Archivist's brief that the preamble that accompanied GRS 20's publication made it clear that even "hidden comments or summaries that are not printed out—the electronic equivalents of a Post-it note or an abstract"—must be printed out and stored in the recordkeeping system. Pet. App. 18a-19a. As the court observed (*id.* at 19a), the preamble expressly states that records may not be deleted until they have been transferred to a recordkeeping system that "preserves their content, structure and context." 60 Fed. Reg. at 44,644. The meaning of that directive is plain: If a record, such as a word processing file, necessarily includes comments or summaries appended

The paragraph following that discussion goes on to state that the Archivist's interpretation is entitled to deference even if it "comes for the first time in litigation," so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Pet. App. 19a (quoting *Auer*, 519 U.S. at 462). Because that statement appears to have been unnecessary to the judgment, it does not furnish a reason for further review. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (This Court "reviews judgments, not statements in opinions.").[11] Any deference to the agency's "fair and considered judgment," moreover, did not aggrieve petitioners. In the court of appeals, petitioners argued that the Archivist's regulations *should* require the preservation of otherwise hidden materials, like abstracts, comment fields, etc. Pet. App. 19a. The court of appeals merely concluded that GRS 20 in fact contains the very requirement petitioners were insisting upon. It is hard to see how petitioners can claim to be

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to it, the "content, structure and context" of the record cannot be preserved without that information as well. The court of appeals then cited government counsel's statement at oral argument as another way of stating the same conclusion: "In other words, as counsel for the Archivist put it at oral argument, if the information is part of a record * * * then it must be preserved." Pet. App. 19a. Finally, the court of appeals noted that that interpretation of GRS 20 is consistent with GRS 20's requirement that word processing files be "copied" to the recordkeeping system. Circuit case law, the court noted, holds that paper versions are not "copies" within the meaning of the FRA if they do not include all significant information contained in the electronic version. *Ibid.*

[11] See also *Chevron*, 467 U.S. at 842 ("this Court reviews judgments, not opinions"); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945) (noting that the Court's "power is to correct wrong judgments, not revise opinions").

aggrieved by the conclusion that GRS 20 includes a requirement that, in petitioners' view as well, should be part of GRS 20. See *ibid.* ("Considering the substance of" the Archivist's interpretation, "we trust that [petitioners are] not aggrieved by" deference). And, for the same reason, petitioners' challenge to the court of appeals' conclusion is largely academic in nature. It therefore does not warrant further review.

3. Finally, petitioners appear to argue that GRS 20 is contrary to various policy statements made by the Archivist. Pet. 10. Many of those policy statements, however, were made in the course of considering new alternatives in response to the district court's decision striking down GRS 20. There is no basis for using agency proposals designed to *comply* with a district court ruling that the agency has appealed as evidence that the district court's ruling is correct. Besides, the fact that the Archivist has discussed and considered changes to GRS 20 does not undermine the validity of the current rule, so long as the current rule is a reasonable alternative among many, which it is. An agency is entitled to consider varying interpretations and the wisdom of its policy on a continuing basis. *Chevron*, 467 U.S. at 863-864; see *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991).

Moreover, as petitioners' own brief makes clear, the Archivist has indicated (apart from this litigation) that he is considering changes to GRS 20 and agency record-keeping requirements. See Pet. 10. Further review of the Archivist's construction and application of the Records Disposal Act, if any, should await the Archivist's

announcement of a more permanent resolution of those matters.[12]

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[12] As we explained at greater length in our brief in opposition (at 26-28) in *Armstrong* v. *Executive Office of the President*, 520 U.S. 1239 (1997) (No. 96-1242), we believe that the Administrative Procedure Act (APA) does not afford petitioners a cause of action for judicial review of the recordkeeping requirements promulgated by the Archivist under the FRA. See also Gov't C.A. Br. 11 n.3 (preserving the issue in this case, while acknowledging that circuit precedent permitted APA review). To obtain APA review of administrative action, a plaintiff must show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980), this Court stated that the FRA was enacted "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." Also, review under the APA is unavailable when a legislative intent to preclude judicial review is "fairly discernible in the statutory scheme," *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); see 5 U.S.C. 701(a)(1). If the Court grants review, the question of petitioners' right to seek judicial review under the APA would be logically antecedent to (and a potential barrier to reaching) the merits-based questions raised in the certiorari petition. That alternative ground for affirmance of the court of appeals' rejection of petitioners' claims under the FRA provides an additional reason for the Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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